Supreme Court, U.S.
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Supreme Court of the United States

ROBERTO BERAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERTO BERAS
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QUESTIONS PRESENTED

1.) Whether, as the Courts of Appeals for the Third and Ninth Circuits have held, in conflict with the decision below, when relevant conduct dramatically increases a federal criminal sentence, should the standard of review be based on clear and convincing evidence?

2.) Where (i) a preindictment delay of 5 years from the beginning of charged conduct occurred, (ii) Petitioner was indicted 2 ½ years after others were indicted, and (iii) Petitioner was prejudiced by the delay because of loss of a critical witness, was the denial of Petitioner's motion to dismiss the indictment as violative of due process a such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Second Circuit.

More specifically, the Petitioner Roberto Beras and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

Page:

Questions Presented i
List of Parties to the Proceedings
in the Courts Below ii
Table of Contents iii
Table of Authorities .....
Petition for a Writ of Certiorari 1
Opinions Below 1
Statement of Jurisdiction 2
Constitutional Provisions,
Treaties, Statutes, Rules,
and Regulations Involved 3
Statement of the Case 6
Reasons for Granting the Writ 11

1.) THIS COURT SHOULD GRANT MR. BERAS' PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO THE STANDARD OF REVIEW WHEN THE BASE OFFENSE LEVEL AT A FEDERAL SENTENCING IS DRAMATICALLY INCREASED BY RELEVANT CONDUCT 11

1A.) The Courts Of Appeals Are Divided As To Whether And When A Dramatic Increase In A Federal Criminal Defendant's Sentence, Based On Relevant Conduct Instead Of The Offense Of Conviction, Should Require "Clear And Convincing Evidence" Instead Of The Usual "Preponderance Of Evidence" Standard. 12

1B.) Under The Holdings Of The Third And Ninth Circuits, Petitioner's Sentence Would Have Been Limited To 46-57 Months Instead Of The 292 Months He Received In The Second Circuit. 14

2.) THIS COURT SHOULD GRANT MR. BERAS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION 16

1C.) The Five Year Delay In The Indictment Of Mr. Beras Was Violative Of His Fifth Amendment Constitutional Right To Due Process Of Law And Mandates This Court To Vacate And Remand For Dismissal Of The Indictment 17

Conclusion 22

Appendix....23

USCA Opinion Dated 12-19-02....A

USCA Opinion Dated 12-20-02....B

USDC Judgment & Commitment Order Entered 11-28-01....C

USCA Denial of Rehearing Dated 10-9-03 ....D

USDC Order Denying Motion To Dismiss Entered 3-6-00 ....E

TABLE OF AUTHORITIES

Page:

Cases

Benanti v. United States,
355 U.S. 96 (1957) *16, 20*
Braxton v. United States,
500 U.S. 344,
114 L.Ed.2d 385, 111 S.Ct. 1854 (1991) *13*
Elkins v. United States,
364 U.S. 206 (1960) *16, 21*
GACA v. United States,
411 U.S. 618 (1973) *16, 20*
Kinder v. United States,
504 U.S. 946 (1992) *13*
McMillan v. Pennsylvania,
477 U.S. 79, 91-92, 91 L. Ed. 2d 67,
106 S. Ct. 2411 (1986) *14*
McNabb v. United States,
318 U.S. 332 (1943) *16, 20*
Montana v. Hall,
481 U.S. 400, 406,
95 L.Ed.2d 354, 107 S.Ct. 1825 (1987) *13*
Rea v. United States,
350 U.S. 214 (1956) *16, 20*
Stinson v. United States,
508 U.S. ___, ___, and [n.],
123 L.Ed.2d 598, 605 and [n. 2],
113 S.Ct. 1913 (1993) *14*
United States v. (Randy) Graham,
275 F.3d 490, 517 n.19 (6th Cir. 2001) *12*
United States v. (Steven A.) Graham,
317 F.3d 262, 269-70 (D.C. Cir. 2003) *13*
United States v. Behrens,
375 U.S. 162 (1963) *16, 20*

United States v. Cordoba-Murgas,
233 F.3d 704, 709 (2nd Cir. 2000) *12*
United States v. Crouch,
835 F. Supp. 938; 1993 U.S. Dist. LEXIS 15275
(SD TX 1993) *17*
United States v. Harmon,
379 F. Supp. 1349; 1974 U.S. Dist. LEXIS 7262
(D NJ 1974) *17*
United States v. Jackson,
333 U.S. App. D.C. 125, 161 F.3d 24,
26-27 (D.C. Cir. 1998) *13*
United States v. Jacobs,
429 U.S. 909 (1976) *16, 20*
United States v. Jordan,
256 F.3d 922, 927-29 (9th Cir. 2001) *12*
United States v. Kikumura,
918 F.2d 1084, 1097-1102 (3rd Cir. 1990) *12*
United States v. Lam Kwong-Wah,
296 U.S. App. D.C. 162, 966 F.2d 682,
687-88 (D.C. Cir. 1992) *13*
United States v. Lewis,
115 F.3d 1531, 1536-37 (11th Cir. 1997) *13*
United States v. Lombard,
102 F.3d 1, 5 (1st Cir. 1996) *13*
United States v. Mendoza,
464 U.S. 154,
78 L.Ed.2d 379, 104 S.Ct. 568 (198) *13*
United States v. Miner,
127 F.3d 610, 613-14 (7th Cir. 1997) *13*
United States v. Montgomery,
262 F.3d 233, 249-50 (4th Cir.),
cert. denied, 534 U.S. 1034, 151 L. Ed. 2d 448,
122 S. Ct. 576 (2001) *12*
United States v. Paster,
173 F.3d 206, 219-21 (3d Cir. 1999) *12*

United States v. Reed,
496 F. Supp. 865; 1980 U.S. Dist. LEXIS 13386 (ED AR 1980).....17
United States v. Richburg,
478 F. Supp. 535; 1979 U.S. Dist. LEXIS 13265 (MD TN 1979).....17
United States v. Sabath,
990 F. Supp. 1007; 1998 U.S. Dist. LEXIS 476 (ND IL 1998).....17
United States v. Sample,
565 F. Supp. 1166; 1983 U.S. Dist. LEXIS 16980 (ED VA 1983).....17
United States v. Thompson,
51 F.3d 122, 125 (8th Cir. 1995).....13
United States v. Toms,
329 U.S. App. D.C. 33, 136 F.3d 176, 186-87 (D.C. Cir. 1998).....13
United States v. Vital,
68 F.3d 114, 121 (5th Cir. 1995).....13
United States v. Washington,
11 F.3d 1510, 1516 (10th Cir. 1993).....12
United States v. Watts,
519 U.S. 148, 152-53, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997).....12, 13, 14

Statutes

28 U.S.C. § 1254(1).....2

Other Authorities

U.S.C.A. Fifth Amendment.....3
U.S.S.G. § 1B1.3.....3
U.S.S.G. § 6A1.3.....4, 12, 13

Rules

Supreme Court Rule 10.....11, 12
Supreme Court Rule 10(a).....13, 15

PETITION FOR A WRIT OF CERTIORARI

Roberto Beras, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on 12-19-02.

OPINIONS BELOW

The *published* 12-19-02 opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is reported at 313 F.3d 803; 2002 U.S. App. LEXIS 26211 and is reprinted in the separate Appendix A to this Petition.

The *unpublished* prior opinion and judgment of the United States Court of Appeals for the Second Circuit in the direct appeal in this case, entered on 12-20-02, is reported at 57 Fed. Appx. 456; 2002 U.S. App. LEXIS 26738, and is reprinted in the separate Appendix B to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Second Circuit on 10-9-03. This opinion is an unpublished decision, and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District Of New York, entered on 11-28-01, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States District Court for the Southern District Of New York Denying Mr. Beras' Motion To Dismiss, is an unpublished decision reported at 2000 U.S. Dist. LEXIS 2439, and is reprinted in the separate Appendix E to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 12-19-02. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

U.S.S.G. § 1B1.3 provides in relevant part:

> **§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**
>
> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in

furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

U.S.S.G. § 6A1.3 provides in relevant part:

§ 6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the

sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy…

Commentary

… The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. *Id.* (As amended effective 11-1-02)

STATEMENT OF THE CASE

This case arose out of an undercover investigation initiated in 1993 by the El Dorado Task Force, a group of United States Customs Service agents, Internal Revenue Service agents, and members of the New York City Police Department, assembled for the purpose of investigating money laundering offenses. Dinero Express was one of many money remitting services in New York City targeted by the task force. The investigation of Dinero Express involved the use of a confidential informant ("CI") who allegedly presented himself on several occasions to employees of Dinero Express as a drug trafficker with significant sums of cash to transfer to Puerto Rico and the Dominican Republic. On seven occasions from June 1994 through July 1996, the CI allegedly took cash ranging in value from $47,500 to $100,000 to the Dinero Express office at 591 W. 181st Street, New York, New York, and requested that the funds be transferred to Puerto Rico or the Dominican Republic. The transfers allegedly took place and undercover agents in the destination locations allegedly retrieved the transferred funds. Dinero Express allegedly did not file currency transaction reports ("CTRs"), as required by law, for these transactions. (CR 18-19);[1] *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

Based on information obtained from the CI, recorded conversations, and other sources, the government, in July and August of 1996, prepared affidavits in support of search and arrest warrants in which they submitted that they had probable cause to believe that Rafael Liriano, Rolondo Liriano, and Hendrix Tavarez, had committed federal money laundering and currency reporting offenses, in violation of 18 U.S.C. §§ 1956, 1957 and 31 U.S.C. § 5324. Roberto Beras was not named as a defendant in either affidavit. The

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[1] This refers to the District Court "Clerk's Record", entry #18.

government thereafter obtained the requested search warrants and searched the premises at 591 W. 181st Street and 1887 Webster Avenue. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

On or about July 31, 1996, the government filed a sealed complaint charging Rafael Liriano, Hendrix Tavarez, and Rolondo Liriano with conspiracy to commit money laundering and currency reporting offenses, and substantive money laundering and money structuring offenses, all in violation of 18 U.S.C. §§ 371, 1956, and 31 U.S.C. § 5324. Roberto Beras was not named in this complaint, nor in the subsequent indictment of Rafael Liriano, Hendrix Tavarez, and Rolondo Liriano. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

Roberto Beras was not charged with any offense relating to this investigation until on or about January 27, 1999, when the government filed a sealed complaint charging Mr. Beras with conspiracy to commit money laundering and currency reporting offenses, and the substantive offenses of money laundering and currency reporting violations, in violation of 18 U.S.C. § 1956. Mr. Beras was not indicted until March 30, 1999. The overt acts set forth in the complaint and the indictment are limited to the time period between June 1994 and July 1996, and substantially mirror the conduct which formed the basis of the 1996 charges against Rafael Liriano, Hendrix Tavarez, and Rolondo Liriano. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

On 4-29-99, Mr. Beras was charged in a Second Superseding Indictment with violation of 18 U.S.C.S. § 1956 (h) (conspiracy to commit money laundering) (Count 1); 18 U.S.C.S. § 371 (conspiracy to evade currency reporting requirements) (Count 2); 18 U.S.C.S. § 2 and 18 U.S.C.S. § 1956(a)(2)(B) (international money laundering) (Counts 3-35); 18 U.S.C.S. § 2 and 18 U.S.C.S. § 1956(a)(3) (money laundering) (Counts 36-42); 18 U.S.C.S. § 2 and 31 U.S.C.S.

§ 5324(a)(3) (evading currency reporting requirements by structuring financial transactions) (Counts 43-75); 18 U.S.C.S. § 2 and 31 U.S.C.S. § 5324(a)(1) (evading currency reporting requirements by causing a domestic financial institution to fail to file a currency transaction report) (Counts 76-81). (CR 10)

Nearly five years passed between the time the government alleges the offense conduct began and the indictment of Roberto Beras. More than two and one-half years separate the search of Dinero Express offices and indictment of several Dinero Express employees from the indictment of Roberto Beras. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

During the five year time period, a critically important witness, Rafael Liriano, became unavailable. Liriano could have testified for Mr. Beras that Mr. Beras was not present when money was counted and, therefore, was not aware of the nature of the funds received by Dinero Express. Because he was unavailable, the government delay prejudiced Mr. Beras. (CR 18-19)

While the government advanced after the fact, self serving reasons for the delay, the fact remains that the delay was extensive, that Mr. Beras could have been indicted much earlier and that Mr. Beras was prejudiced by the delay. (CR 18-19)

On 12-1-99, counsel for Mr. Beras recounted the foregoing facts and moved for dismissal of the indictment based on prejudicial preindictment delay. (CR 18-19)

On 3-6-00, the District Court denied the motion for dismissal of the indictment. (Appendix E)

Mr. Beras proceeded to trial. At trial, the government introduced circumstantial evidence and substantiated it with the testimony of witnesses who had been persuaded by the government to cooperate during the preindictment delay.

On 12-4-00 Mr. Beras was found guilty by the jury as to the charges of the Second Superseding Indictment.

On 11-21-01, Mr. Beras was sentenced to 292 months incarceration plus 3 years supervised release, $4,100.00 special assessment, and forfeiture of substantial properties for the charges of the Second Superseding Indictment This sentence represented a "Total Offense Level" of 40 with a Criminal History of I which had resulted in a guideline sentencing range of 292-365 months.

Significantly, the "Base Offense Level" for Mr. Beras' offense was "23" which would have resulted in a guideline sentencing range of 46-57 months incarceration.

The sentencing findings of the Court for all but 3 points of the 17 point enhancement from level 23 to level 40, guideline sentencing range 46-57 to 292-365 months, were made under the "preponderance of evidence" standard; a 6 fold increase in his sentence based on "relevant conduct". *United States v. Roberto Beras, et al,* 57 Fed. Appx. 456; 2002 U.S. App. LEXIS 26738 *17 (2nd Cir. 12-20-02) (Appendix B)

On direct appeal, counsel renewed the challenge to both the denial of Mr. Beras' motion to dismiss the indictment and to the enhancement of Mr. Beras' sentence.[2]

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[2] Counsel also challenged other evidentiary rulings as well as whether Mr. Beras' alleged practice of accepting sums of money from drug traffickers at the New York headquarters of his money remitting business, and then allegedly paying the same sums of money, minus commission, from his business's Dominican Republic branch office to members of the drug traffickers' networks located in the Dominican Republic constituted a "transfer" of funds within the meaning of the international money laundering statute. In a pro se supplemental brief and a petition for rehearing, Mr. Beras also challenged, *inter alia*, the denial of his motion to dismiss based on preindictment delay and additionally challenged his indictment as being based on selective prosecution; a denial of equal protection.

In a 12-19-02 published order and a 12-20-03 unpublished summary order, the Court of Appeals denied Mr. Beras' appeal. In denying the appeal, the Court of Appeals specifically held that the "preponderance of evidence" standard was appropriate. The Court of Appeals also affirmed the denial of Mr. Beras' motion to dismiss the indictment.

Mr. Beras demonstrates within that (A) this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals as to the standard of review when the base offense level at a federal sentencing is dramatically increased by relevant conduct; and (B) this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. BERAS' PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO THE STANDARD OF REVIEW WHEN THE BASE OFFENSE LEVEL AT A FEDERAL SENTENCING IS DRAMATICALLY INCREASED BY RELEVANT CONDUCT.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call

for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) The Courts Of Appeals Are Divided As To Whether And When A Dramatic Increase In A Federal Criminal Defendant's Sentence, Based On Relevant Conduct Instead Of The Offense Of Conviction, Should Require "Clear And Convincing Evidence" Instead Of The Usual "Preponderance Of Evidence" Standard.

As this Court has, observed, there is "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." *United States v. Watts*, 519 U.S. 148, 152-53, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (footnote omitted). Two circuits have required clear and convincing evidence for extreme sentencing enhancements. See *United States v. Jordan*, 256 F.3d 922, 927-29 (9th Cir. 2001); *United States v. Paster*, 173 F.3d 206, 219-21 (3d Cir. 1999); *United States v. Kikumura*, 918 F.2d 1084, 1097-1102 (3rd Cir. 1990). At least two circuits, however, have rejected a heightened standard of proof at sentencing, see, e.g., *United States v. (Randy) Graham*, 275 F.3d 490, 517 n.19 (6th Cir. 2001), *cert. denied*, 535 U.S. 1026, 152 L. Ed. 2d 636, 122 S. Ct. 1625 (2002); *United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), while others have found that the case before them did not merit a higher standard and simply follow U.S.S.G. § 6A1.3. see, e.g., *United States v. Montgomery*, 262 F.3d 233, 249-50 (4th Cir.), *cert. denied*, 534 U.S. 1034, 151 L. Ed. 2d 448, 122 S. Ct. 576 (2001); *United States v. Cordoba-Murgas*, 233 F.3d 704, 709 (2nd Cir. 2000); *United States v.*

Lewis, 115 F.3d 1531, 1536-37 (11th Cir. 1997); *United States v. Miner*, 127 F.3d 610, 613-14 (7th Cir. 1997); *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996); *United States v. Thompson*, 51 F.3d 122, 125 (8th Cir. 1995); *United States v. Vital*, 68 F.3d 114, 121 (5th Cir. 1995). The District of Columbia Circuit, for its part, has noted the split among the circuits on this issue but has declined to require more than the preponderance standard at sentencing. See *United States v. (Steven A.) Graham*, 317 F.3d 262, 269-70 (D.C. Cir. 2003); *United States v. Jackson*, 333 U.S. App. D.C. 125, 161 F.3d 24, 26-27 (D.C. Cir. 1998); *United States v. Toms*, 329 U.S. App. D.C. 33, 136 F.3d 176, 186-87 (D.C. Cir. 1998); *United States v. Lam Kwong-Wah*, 296 U.S. App. D.C. 162, 966 F.2d 682, 687-88 (D.C. Cir. 1992), *overruled on other grounds*, *United States v. Fields*, 345 U.S. App. D.C. 205, 242 F.3d 393, 396 (D.C. Cir. 2001).

This case continues the split. The courts cannot decide the scope of U.S.S.G. § 6A1.3.

The split in the circuits is clear cut and this case demonstrates that the opposing positions are hardening instead of harmonizing.

This Court has never resolved this question which divides the Courts of Appeals although it has acknowledged the split. *United States v. Watts*, 519 U.S. 148, 152-53, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997); *Kinder v. United States*, 504 U.S. 946 (1992) (White, J., dissenting from denial of certiorari). As is apparent from the numerous published decisions, the unsettled question is a constantly recurring one which has created much uncertainty in the courts below. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See: Supreme Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95 L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (198); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598,

605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States,* 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

1B.) Under The Holdings Of The Third And Ninth Circuits, Petitioner's Sentence Would Have Been Limited To 46-57 Months Instead Of The 292 Months He Received In The Second Circuit.

While it's clear that the preponderance of the evidence standard ordinarily applies to sentencing determinations. *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). And, in fact, the Sentencing Commission has suggested "that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3 (Policy Statement) commentary (2000). And while the Supreme Court has held that a sentencing court may take acquitted conduct into account in setting the appropriate sentence, *United States v. Watts*, 519 U.S. 148, 152-53, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (per curiam), the Court has indicated that in extraordinary circumstances where the disputed sentencing factors become "a tail which wags the dog of the substantive offense," due process requires proof by clear and convincing evidence. *McMillan*, 477 U.S. at 88.

In Mr. Beras' case, the tail wagged the dog.

As set forth above, on 11-21-01, Mr. Beras was sentenced to 292 months incarceration plus 3 years supervised release, $4,100.00 special assessment, and forfeiture of substantial properties for the charges of the Second Superseding Indictment This sentence represented a "Total Offense Level" of 40 with a Criminal History of I which had resulted in a guideline sentencing range of 292-365 months.

Significantly, the "Base Offense Level" for Mr. Beras' offense was "23" which would have resulted in a guideline sentencing range of 46-57 months incarceration.

The sentencing findings of the Court for all but 3 points of the 17 point enhancement from level 23 to level 40, guideline sentencing range 46-57 to 292-365 months, were made under the "preponderance of evidence" standard; a 6 fold increase in his sentence based on "relevant conduct". *United States v. Roberto Beras, et al,* 57 Fed. Appx. 456; 2002 U.S. App. LEXIS 26738 *17 (2nd Cir. 12-20-02) (Appendix B)

Had Mr. Beras been tried in the Third or Ninth Circuit, he would have been entitled to at least argue that the clear and convincing standard of proof was needed to support the 17 levels enhancement which multiplied his sentence 6 times from the guideline sentencing range of 46-52 months to the 292 months sentence he actually received.

Moreover, in the Third or Ninth Circuit, Mr. Beras would almost certainly have prevailed on his argument and would have been sentenced within the guideline sentencing range of 46-52 months. As set forth above, the outcome of litigation should not depend on the location of the court in which it occurs. Mr. Beras should not be sentenced to what amounts to a life sentence from the Second Circuit when equally situated individuals in the Third and Ninth Circuit would serve only 46-52 months. These facts strongly militate for grant of certiorari. See: Supreme Court Rule 10(a)

2.) THIS COURT SHOULD GRANT MR. BERAS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[3] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

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[3] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

1C.) The Five Year Delay In The Indictment Of Mr. Beras Was Violative Of His Fifth Amendment Constitutional Right To Due Process Of Law And Mandates This Court To Vacate And Remand For Dismissal Of The Indictment.

It is long settled law that while statutes of limitations, provide the primary guarantee against bringing overly stale criminal charges, the statute of limitations does not fully define defendants' rights with respect to the events occurring prior to indictment and the Due Process clause also has a role to play in protecting against oppressive delay. *United States v. Marion,* 404 U.S. 307; 92 S. Ct. 455; 30 L. Ed. 2d 468; 1971 U.S. LEXIS 4 (1971); *United States v. Lovasco,* 431 U.S. 783; 97 S. Ct. 2044; 52 L. Ed. 2d 752; 1977 U.S. LEXIS 107 (1977).

In fact, over the years numerous courts have dismissed indictments due to preindictment delay. *United States v. Harmon,* 379 F. Supp. 1349; 1974 U.S. Dist. LEXIS 7262 (D NJ 1974); *United States v. Crouch,* 835 F. Supp. 938; 1993 U.S. Dist. LEXIS 15275 (SD TX 1993); *United States v. Reed,* 496 F. Supp. 865; 1980 U.S. Dist. LEXIS 13386 (ED AR 1980); *United States v. Richburg,* 478 F. Supp. 535; 1979 U.S. Dist. LEXIS 13265 (MD TN 1979); *United States v. Sabath,* 990 F. Supp. 1007; 1998 U.S. Dist. LEXIS 476 (ND IL 1998); *United States v. Sample,* 565 F. Supp. 1166; 1983 U.S. Dist. LEXIS 16980 (ED VA 1983).

As set forth in the Statement of the Case, supra, This case arose out of an undercover investigation initiated in 1993 by the El Dorado Task Force, a group of United States Customs Service agents, Internal Revenue Service agents, and members of the New York City Police Department, assembled for the purpose of investigating money laundering offenses. Dinero Express was one of many money remitting services in New York City targeted by the task force. The

investigation of Dinero Express involved the use of a confidential informant ("CI") who allegedly presented himself on several occasions to employees of Dinero Express as a drug trafficker with significant sums of cash to transfer to Puerto Rico and the Dominican Republic. On seven occasions from June 1994 through July 1996, the CI allegedly took cash ranging in value from $47,500 to $100,000 to the Dinero Express office at 591 W. 181st Street, New York, New York, and requested that the funds be transferred to Puerto Rico or the Dominican Republic. The transfers allegedly took place and undercover agents in the destination locations allegedly retrieved the transferred funds. Dinero Express allegedly did not file currency transaction reports ("CTRs"), as required by law, for these transactions. (CR 18-19);[4] *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

Based on information obtained from the CI, recorded conversations, and other sources, the government, in July and August of 1996, prepared affidavits in support of search and arrest warrants in which they submitted that they had probable cause to believe that Rafael Liriano, Rolondo Liriano, and Hendrix Tavarez, had committed federal money laundering and currency reporting offenses, in violation of 18 U.S.C. §§ 1956, 1957 and 31 U.S.C. § 5324. Roberto Beras was not named as a defendant in either affidavit. The government thereafter obtained the requested search warrants and searched the premises at 591 W. 181st Street and 1887 Webster Avenue. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

On or about July 31, 1996, the government filed a sealed complaint charging Rafael Liriano, Hendrix Tavarez, and Rolondo Liriano with conspiracy to commit money laundering and currency reporting offenses, and substantive money laundering and money structuring offenses, all in

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[4] This refers to the District Court "Clerk's Record", entry #18.

violation of 18 U.S.C. §§ 371, 1956, and 31 U.S.C. § 5324. Roberto Beras was not named in this complaint, nor in the subsequent indictment of Rafael Liriano, Hendrix Tavarez, and Rolondo Liriano. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

Roberto Beras was not charged with any offense relating to this investigation until on or about January 27, 1999, when the government filed a sealed complaint charging Mr. Beras with conspiracy to commit money laundering and currency reporting offenses, and the substantive offenses of money laundering and currency reporting violations, in violation of 18 U.S.C. § 1956. Mr. Beras was not indicted until March 30, 1999. The overt acts set forth in the complaint and the indictment are limited to the time period between June 1994 and July 1996, and substantially mirror the conduct which formed the basis of the 1996 charges against Rafael Liriano, Hendrix Tavarez, and Rolondo Liriano. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

On 4-29-99, Mr. Beras was charged in a Second Superseding Indictment with violation of 18 U.S.C.S. § 1956 (h) (conspiracy to commit money laundering) (Count 1); 18 U.S.C.S. § 371 (conspiracy to evade currency reporting requirements) (Count 2); 18 U.S.C.S. § 2 and 18 U.S.C.S. § 1956(a)(2)(B) (international money laundering) (Counts 3-35); 18 U.S.C.S. § 2 and 18 U.S.C.S. § 1956(a)(3) (money laundering) (Counts 36-42); 18 U.S.C.S. § 2 and 31 U.S.C.S. § 5324(a)(3) (evading currency reporting requirements by structuring financial transactions) (Counts 43-75); 18 U.S.C.S. § 2 and 31 U.S.C.S. § 5324(a)(1) (evading currency reporting requirements by causing a domestic financial institution to fail to file a currency transaction report) (Counts 76-81). (CR 10)

Nearly five years passed between the time the government alleges the offense conduct began and the indictment of Roberto Beras. More than two and one-half

years separate the search of Dinero Express offices and indictment of several Dinero Express employees from the indictment of Roberto Beras. (CR 18-19); *United States v. Roberto Beras, et al,* 2000 U.S. Dist. LEXIS 2439 **2-8 (SD NY 3-6-00)

During the five year time period, a critically important witness, Rafael Liriano, became unavailable. Liriano could have testified for Mr. Beras that Mr. Beras was not present when money was counted and, therefore, was not aware of the nature of the funds received by Dinero Express. Because he was unavailable, the government delay prejudiced Mr. Beras. (CR 18-19)

While the government advanced after the fact, self serving reasons for the delay, the fact remains that the delay was extensive, that Mr. Beras could have been indicted much earlier and that Mr. Beras was prejudiced by the delay. (CR 18-19)

On 12-1-99, counsel for Mr. Beras recounted the foregoing facts and moved for dismissal of the indictment based on prejudicial preindictment delay. (CR 18-19)

On 3-6-00, the District Court denied the motion for dismissal of the indictment. (Appendix E) On appeal, the Court of Appeals affirmed this denial of the motion to dismiss.

The decisions of the numerous federal courts cited above demonstrate that Mr. Beras was denied fundamental fairness and his Fifth Amendment constitutional right to Due Process of law.

Based on the foregoing, the decision by the Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*,

375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Second Circuit in Mr. Beras' case.

CONCLUSION

For all of the foregoing reasons, Petitioner Roberto Beras respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

ROBERTO BERAS
45865-054
P.O. Box 10
Lisbon, OH 44432

Date: _____

No.

Supreme Court of the United States

ROBERTO BERAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

COMES NOW PETITIONER Roberto Beras and submits the attached appendix pursuant to Supreme Court Rules.

ROBERTO BERAS
45865-054
P.O. Box 10
Lisbon, OH 44432

Date:_____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED 12-19-02

313 F.3d 803, *; 2002 U.S. App. LEXIS 26211, **

UNITED STATES OF AMERICA,Appellee, -v.- DINERO EXPRESS, INC.; LUIS FRANCISCO SORIANO, also known as "Luis Francisco Soriano," also known as Francisco Luis Soriano; MARIA Y. MENDOZA, Defendants, ROBERTO BERAS, also known as "Robert Silvestre," Defendant-Appellant.

Docket No. 01-1634

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

313 F.3d 803; 2002 U.S. App. LEXIS 26211

November 22, 2002, Argued

December 19, 2002, Decided

PRIOR HISTORY: [**1] Appeal from a judgment of the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge) convicting Defendant-Appellant Roberto Beras of, inter alia, 33 counts of international money laundering, in violation of 18 U.S.C. § 1956(a)(2). Beras' convictions were based principally on his practice of accepting sums of money from drug traffickers at the New York headquarters of his money remitting business, and then paying the same sums of money, minus commission, from his business's Dominican Republic branch office to members of the drug traffickers' networks located in the Dominican Republic. Such conduct, we hold, constitutes a "transfer" of funds within the meaning of the international money laundering statute.

DISPOSITION: Affirmed.

COUNSEL: ANDREW J. CERESNEY, Assistant United States Attorney, Southern District of New York, New York, NY (James B. Comey, United States Attorney, on the brief; Robin L. Baker, Assistant United States Attorney, of counsel), for Appellee.

DAVID S. ZAPP, New York, NY (Marjorie M. Smith, of counsel), for Defendant-Appellant.

JUDGES: Before: F.I. PARKER, STRAUB, and RAGGI, Circuit Judges.

OPINIONBY: STRAUB

OPINION: [*804]

STRAUB, [**2] Circuit Judge:

Defendant-Appellant Roberto Beras appeals from a November 28, 2001 judgment of the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge) convicting him, following a jury trial, of one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); one count of conspiracy to evade currency reporting requirements, in violation of 18 U.S.C. § 371; thirty-three counts of international money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(2)(B); seven counts of money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(3); thirty-three counts of evading currency reporting requirements by structuring financial transactions, in violation of 18 U.S.C. § 2 and 31 U.S.C. § 5324(a)(3); and seven counts of evading currency reporting requirements by causing a domestic financial institution to fail to file a currency transaction report, in violation of 18 U.S.C. § 2 and 31 U.S.C. § 5324(a)(1).

Beras raises a host of challenges to [**3] his convictions. All but one of these claims are disposed of by a summary order issued simultaneously with this opinion. We write here only to make clear that when an individual delivers a sum of money to the domestic office of a business entity--in this case, a licensed money remitter--and the foreign office of that entity pays out the same sum of money, minus commission, to the individual's associates located [*805] in that foreign country, the entity has engaged in a "transfer" of funds "from a place in the United States to . . . a place outside the United States," as prohibited under 18 U.S.C. § 1956(a)(2).

I.

At all relevant times, Beras served as co-owner and vice-president of Dinero Express, Inc. ("Dinero"), a licensed money remitter that specialized in transmitting money on behalf of customers in the United States to locations in the

Dominican Republic and Puerto Rico. The evidence adduced at trial showed that between 1994 and 1996, Beras--in conjunction with other Dinero co-owners and officers--used Dinero and its employees in furtherance of an extensive international money laundering scheme. In exchange for commissions that generally totaled five [**4] percent of each transaction, Beras and his co-conspirators accepted from area drug traffickers cash deposits known to be the proceeds of illegal narcotics sales, and then, via a number of different techniques, arranged for the transport or transfer of those deposits from Dinero's headquarters in Manhattan to members of the traffickers' networks located in the Dominican Republic and Puerto Rico.

The laundering practice specifically at issue in this appeal involved the transfer of drug proceeds to the Dominican Republic under the guise of phony money remittances through a four-step process. First, drug traffickers delivered their cash to Dinero's New York headquarters for gradual deposit into the company's bank accounts in the United States. Second, Dinero remittance invoices were generated for fictitious transactions to the Dominican Republic; the invoices used false identities and addresses and were made out in amounts small enough to avoid currency reporting requirements. n1 Third, arrangements were made for a Dominican "peso supplier" to advance local currency--in the same amount as the original deposit delivered to Dinero's New York headquarters, minus commission--to Dinero's Dominican [**5] office, which in turn forwarded the cash to the drug traffickers' Dominican personnel under the pretense of fulfilling the fictitious remittances generated in New York. Fourth, the process culminated with Dinero's repayment of the peso supplier through a wire transfer of funds from Dinero's New York operating account to the peso supplier's bank accounts in the United States.

---------- Footnotes ----------

n1 The purpose of this step was to disguise a single payment to and from Dinero of a sum of money in excess of the currency reporting threshold as multiple payments to and from Dinero, each for a sum well under the reporting threshold.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After a four-week trial, the jury returned a verdict convicting Beras on all eighty-two counts in the indictment. Beras was sentenced to 292 months' imprisonment, three years' supervised release, and a $ 4,100 mandatory special assessment, and was additionally subjected to an order of forfeiture in the amount of $ 10 million.

II.

The international money laundering statute prohibits individuals from [**6] engaging, with the requisite intent or knowledge, in the

transport[], transmittal, or transfer[], or attempt[] to transport, transmit, or transfer [of] a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . .

18 U.S.C. § 1956(a)(2). Beras contends that because no individual step in the phony [*806] remittance scheme involved the direct wiring of money from the United States to the Dominican Republic, there was no "transfer" within the meaning of § 1956(a)(2) and thus his convictions thereunder were improper. We do not agree that such a narrow reading of § 1956(a)(2) is warranted.

To begin, we held in *United States v. Harris*, 79 F.3d 223, 231 (2d Cir.), cert. denied, 519 U.S. 851, 136 L. Ed. 2d 89, 117 S. Ct. 142 (1996), that a multi-step plan to transfer money from one location to another should be viewed as a single "transfer" under § 1956(a)(2). Harris involved a two-step scheme in which the president of a petrochemical company first transferred funds [**7] from the company's New York bank accounts to the company's accounts in Connecticut, and then transferred the Connecticut funds to

Swiss bank accounts. On appeal, we were asked to set aside the defendant's conviction for international money laundering on the ground that the only step in the scheme that actually served the purpose of concealing the source of the funds--the New York-to-Connecticut transfer--was entirely domestic. In rejecting that argument, we stated that

> we do not interpret the movements of funds from New York to Connecticut and then from Connecticut to Switzerland as two separate events. While the scheme was implemented in two stages, each stage was an integral part of a single plan to transfer funds "from a place in the United States to or through a place outside the United States."
>
> . . . Because we consider Harris' movements of funds from New York to Switzerland as single transfers that served to conceal the location of the funds from the banks, we find no basis to disturb Harris' conviction for money laundering.

Id. at 231. Harris thus requires that we view all of the steps in Beras' phony money remittance scheme [**8] as constituting a single event for purposes of § 1956(a)(2).

What remains is determining whether the remittance scheme, viewed as a whole, qualifies as a "transfer" of funds under § 1956(a)(2), even though no money was directly wired from the United States to the Dominican Republic. The ordinary meaning of the term "transfer" is "to move or send to a different location." WEBSTER'S 3D NEW INT'L DICTIONARY 2427 (1993); see also *Park N' Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). And as we have previously stated, the terms in the international money laundering statute must be considered "in light of the objects" to be transferred: money. *United States v. Piervinanzi*, 23 F.3d 670, 678 (2d Cir.), cert. denied, 513 U.S. 904, 130 L. Ed. 2d 185, 115 S. Ct. 267 (1994). Because money is inherently fungible, a person is sensibly considered to have engaged in a "transfer" of money

whenever he accepts money in one [**9] location and, pursuant to an overall course of conduct, causes the delivery of related money to another location. *Cf. United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir. 1982) (ruling that 18 U.S.C. § 2314 covers electronic transfers of funds because "the manner in which the funds were moved does not affect the ability to obtain tangible paper dollars or a bank check from the receiving account"--i.e., "the beginning of the transaction is the money in one account and the ending is money in another"), *cert. denied*, 459 U.S. 1201, 75 L. Ed. 2d 432, [*807] 103 S. Ct. 1185 (1983).

This flexible and expansive reading of the term "transfer" is borne out in the legislative history. Prior to 1988, § 1956(a)(2) contained only the term "transport or attempts to transport" in describing the type of activity prohibited by the statute. See 18 U.S.C. § 1956(a)(2) (Supp. 1987). Congress amended the statute by adding the terms "transmits" and "transfers." See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6471(b), 102 Stat. 4181, 4378 (Nov. 18, 1988). The purpose of the amendment--as set forth in a "section-by-section [**10] analysis" of the bill directed to "those who wish to know the intent of the drafters of this legislation"--was to "clarify that the term 'transports' in the money laundering statute was intended to include electronic and other forms of movement of funds other than physical transportation." 134 Cong. Rec. S17367 (Nov. 10, 1998) (statement of Sen. Biden) (emphasis added). By focusing as a practical matter on the underlying "movement of funds," Congress ensured that law enforcement officials could continue enforcing § 1956(a)(2) in the face of increasingly sophisticated efforts by drug traffickers to hide the true character of their ill-gotten gains. Indeed, we have little doubt but that concealment was the primary motivation for why in this case Beras and his co-conspirators utilized the four-step remittance scheme rather than a single, direct wire transfer.

Accordingly, we hold that a course of conduct that begins with a sum of money located in one country and ends

with a related sum of money located in another may constitute a "transfer" for purposes of § 1956(a)(2). This is true whether or not the particular transactional vehicle for effecting the "transfer" is comprised of [**11] a single step or a series, and whether or not the funds move directly between an account in the United States and one abroad. Because, at bottom, Beras' conduct enabled drug traffickers to move money located in New York to the Dominican Republic, we find no basis to disturb Beras' convictions for international money laundering under 18 U.S.C. § 1956(a)(2).

III.

For the foregoing reasons, we AFFIRM the defendant's convictions for international money laundering under 18 U.S.C. § 1956(a)(2).

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APPENDIX B

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED 12-20-02

UNITED STATES OF AMERICA, Appellee, --v.-- DINERO EXPRESS, INC.; LUIS FRANCISCO SORIANO, also known as "Luis Francisco Soriano," also known as Francisco Luis Soriano; MARIA Y. MENDOZA, Defendants, ROBERTO BERAS, also known as "Robert Silvestre," Defendant-Appellant.

No. 01-1634

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

57 Fed. Appx. 456; 2002 U.S. App. LEXIS 26738

December 20, 2002, Decided

NOTICE: [**1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge). United States v. Dinero Express, Inc., 2000 U.S. Dist. LEXIS 2439 (S.D.N.Y., Mar. 1, 2000)

DISPOSITION: Affirmed.

CASE SUMMARY

COUNSEL: For Appellee: Andrew J. Ceresney, Assistant United States Attorney, Southern District of New York, New York, NY (James B. Comey, United States Attorney, on the brief; Robin L. Baker, Assistant United States Attorney, of counsel).

For Defendant-Appellant: David S. Zapp, New York, NY (Marjorie M. Smith, of counsel).

JUDGES: PRESENT: HON. FRED I. PARKER, HON. CHESTER J. STRAUB, HON. REENA RAGGI, Circuit Judges.

OPINION: [*457] SUMMARY ORDER

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Defendant-Appellant Roberto Beras appeals from a January 28, 2001 judgment of the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge) convicting him, following a jury trial, of one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); [**2] one count of conspiracy to evade currency reporting requirements, in violation of 18 U.S.C. § 371; thirty-three counts of international money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(2)(B); seven counts of money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(3); thirty-three counts of evading currency reporting requirements by structuring financial transactions, in violation of 18 U.S.C. § 2 and 31 U.S.C. § 5324(a)(3); and seven counts of evading currency reporting requirements by causing a domestic financial institution to fail to file a currency transaction report, in violation of 18 U.S.C. § 2 and 31 U.S.C. § 5324(a)(1).

Beras, through counsel, raises a host of challenges to his convictions, all but one of which we consider and reject in this summary order. The remaining argument--that Beras' convictions for international money laundering under 18 U.S.C. § 1956(a)(2) were improper because he did not engage in a "transfer" of funds within the meaning of the statute--we discuss, and [**3] reject, in an opinion separately issued today.

In addition, Beras has raised in several "pro se supplemental briefs" the claim that his trial counsel was ineffective. Those claims are more properly the subject of a petition for habeas corpus under 18 U.S.C. § 2255, [*458] and we therefore will not address them here.

I.

At all relevant times, Beras served as co-owner and vice-president of Dinero Express, Inc. ("Dinero"), a licensed money remitter that specialized in transmitting money on behalf of customers in the United States to locations in the Dominican Republic and Puerto Rico. The evidence adduced

at trial showed that between 1994 and 1996, Beras--in conjunction with other Dinero co-owners and officers--used Dinero and its employees in furtherance of an extensive international money laundering scheme. In exchange for commissions that generally totaled five percent of each transaction, Beras and his co-conspirators accepted from area drug traffickers cash deposits known to be the proceeds of illegal narcotics sales, and then, via a number of different techniques, arranged for the transport or transfer of those deposits from Dinero's headquarters in [**4] Manhattan to members of the traffickers' networks located in the Dominican Republic and Puerto Rico.

Besides the physical transport of cash in suitcases aboard airlines, another laundering practice engaged in by Beras involved the transfer of drug proceeds to the Dominican Republic under the guise of phony money remittances through a four-step process. First, drug traffickers delivered their cash to Dinero's New York headquarters for gradual deposit into the company's bank accounts in the United States. Second, Dinero remittance invoices were generated for fictitious transactions to the Dominican Republic; the invoices used false identities and addresses and were made out in amounts small enough to avoid currency reporting requirements. n1 Third, arrangements were made for a Dominican "peso supplier" to advance local currency--in the same amount as the original deposit delivered to Dinero's New York headquarters, minus commission--to Dinero's Dominican office, which in turn forwarded the cash to the drug traffickers' Dominican personnel under the pretense of fulfilling the fictitious remittances generated in New York. Fourth, the process culminated with Dinero's repayment of the peso [**5] supplier through a wire transfer of funds from Dinero's New York operating account to the peso supplier's bank accounts in the United States.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 The purpose of this step was to disguise a single payment to and from Dinero of a sum of money in excess of the currency reporting threshold as multiple payments to and from Dinero, each for a sum well under the reporting threshold.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After a four-week trial, the jury returned a verdict convicting Beras on all eighty-two counts in the indictment. Beras was sentenced to 292 months' imprisonment, three years' supervised release, and a $ 4,100 mandatory special assessment, and was additionally subjected to an order of forfeiture in the amount of $ 10 million. This timely appeal followed.

II.

Beras contends that the District Court ought to have dismissed the indictment for pre-indictment delay as he was not indicted until five years after the completion of the charged criminal conduct. To prevail on a claim of pre-indictment delay arising under the Fifth Amendment, [**6] a defendant must "bear the 'heavy burden'" of showing, inter alia, that the delay was "a course intentionally pursued by the government for an improper purpose." *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999). An improper purpose, argues Beras, was evidenced in this case by the government's withholding of [*459] charges until a time when it had obtained the cooperation of other Dinero co-conspirators. Yet, the case agent assigned to the Dinero investigation explained that the extra time was required to analyze[] the documents seized from Dinero Express and debrief[] witnesses and cooperating defendants. In addition, [he] received additional documents from some of these cooperating defendants that required extensive analysis. Houlihan Aff. P 3.

The government's decision to refrain from charging a defendant pending investigation of his conduct is not, absent more, an "improper" pre-indictment delay. See *United States v. Lovasco,* 431 U.S. 783, 791, 52 L. Ed. 2d 752, 97 S. Ct.

2044 (1977) ("Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish [**7] the suspect's guilt beyond a reasonable doubt."). To the contrary, "rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Id.* at 795. Thus, "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796. Without sufficient evidence of improper motive, the District Court correctly denied Beras' motion to dismiss the indictment for preindictment delay.

III.

Beras also appeals from the District Court's denial of his motion for severance. In that motion--which Beras raised for the first time following opening statements and again renewed at the close of evidence--Beras contended that the defenses of his co-defendants were mutually antagonistic to his defense because both co-defendants alleged that they were instructed by their "bosses," which included Beras, to perform the acts described in the indictment.

Rule 14 of the Federal Rules of Criminal Procedure [**8] permits the District Court to "grant a severance of defendants" if "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants in an indictment." The rule commits the decision to sever a joint trial "to the sound discretion of the trial judge," *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990), and a district court's denial of a severance motion is reversible only if a defendant can "show prejudice so severe that his conviction constituted a miscarriage of justice and that the denial of his motion constituted an abuse of discretion," *United States v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993) (internal citations omitted), cert. denied, 511 U.S. 1042, 128 L. Ed. 2d 211, 114 S. Ct. 1565 (1994). "[A] district

court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent a jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States,* 506 U.S. 534, 539, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993). [**9] Such a risk might occur if evidence inadmissible against one defendant but probative of guilt is admitted against a co-defendant, or if exculpatory evidence is excluded due to a co-defendant's presence. *Id.* In most cases, however, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.*

Beras identifies no specific trial right that was infringed by his co-defendants' [*460] defenses. No incriminating evidence was admitted that would have been withheld had Beras been tried separately, nor was any potentially exculpatory material hidden from the jury's view as a consequence of the joint trial. Beras instead rests on the proposition that antagonistic defense theories are presumptively prejudicial under Rule 14--a proposition that the Supreme Court in *Zafiro* squarely rejected. See 506 U.S. at 538. In any event, the District Court cured any risk of prejudice by instructing the jury of the government's burden of proving each defendant's guilt beyond a reasonable doubt, and reminding the fact-finders of their duty to evaluate the evidence against each defendant independently.

IV.

Beras challenges various evidentiary [**10] rulings of the District Court, all of which we review for abuse of discretion. *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002) (per curiam). First, the District Court prohibited Beras from eliciting testimony concerning the credibility of a government informant after tapes of conversations between the informant and Beras had been admitted into evidence. Beras argues that his inability to delve into topics such as the amount of money paid to the informant by the government and the informant's prior perjury violated the Confrontation Clause. But as the tape recordings of the informant's

statements were admitted solely to place Beras' own recorded statements in context and not for the truth of the matters asserted, the informant's credibility was simply irrelevant. See *United States v. Barone,* 913 F.2d 46, 49 (2d Cir. 1990).

Second, the District Court admitted expert testimony by an FBI agent on the money remitting business in general, the operations of legal and illegal money remitters, and the connections between drug trafficking and money laundering. Beras claims that such testimony violated our decisions in *United States v. Cruz,* 981 F.2d 659, 659 (2d Cir. 1992), [**11] and *United States v. Castillo*, 924 F.2d 1227, 1231 (2d Cir. 1991). *Castillo* and *Cruz* are inapposite. In those cases, our concern was that the government had used an expert witness to bolster an essential fact in dispute--whether in *Castillo* the defendant really did use a gun as part of his drug deal and whether in *Cruz* the defendant really was present during the relevant narcotics transactions. Here, by contrast, the dispositive question at trial was whether Beras--as evidenced through his conduct--intended to structure and launder monies in furtherance of a drug trafficking enterprise and to avoid financial reporting requirements. Indeed, Beras' sole defense was that he had no knowledge of the Dinero laundering operations, and that the government's cooperating witnesses "repeatedly lied . . . about [his] involvement" in order "to save their own skins." The expert testimony thus had no role, potential or actual, in bolstering the essential fact in dispute in this case: Beras' state of mind. This point is borne out by the fact that, unlike in *Castillo* and *Cruz*, the government in summation never referred to the expert testimony as somehow corroborative [**12] of Beras' unlawful state of mind. See *United States v. Tapia-Ortiz*, 23 F.3d 738, 741 (2d Cir.) ("Our conclusion that no error occurred in this case is supported by the fact that the Government did not place great emphasis on [the expert]'s testimony in its summation."), cert. denied, 513 U.S. 877 (1994).

Third, the District Court admitted falsified remittance forms into evidence under the "business records exception" of Fed. R. Evid. 803(6). Whether or not the forms were appropriately admitted under Rule 803(6), [*461] the forms were also admissible because those documents were used by the government, not for their truth, but to demonstrate the co-conspirators' efforts in concealing their illegal structuring and laundering activities. See *United States v. Sliker*, 751 F.2d 477, 489 (2d Cir.) (records not hearsay where "admitted not to establish the truth of the matters asserted but rather to prove the sham nature of the [transactions]"), cert. denied, 470 U.S. 1058 (1985).

V.

Beras next argues that his convictions for money laundering and structuring are multiplicitous in violation of the Double Jeopardy Clause [**13] because the act of "structuring" the transferred funds was an integral component of the laundering operation as a whole. Although Beras concedes that the test in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), is satisfied because the money laundering statute and the structuring statute each requires proof of a fact that the other does not, he nevertheless argues that *Blockburger* does not control because, in enacting both statutes through a single legislative act--the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1986)--Congress impliedly intended to prohibit cumulative punishment. The Supreme Court rejected such reasoning in *Albernaz v. United States*, 450 U.S. 333, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981), a case involving cumulative punishments for conspiracy to import and distribute marijuana, in violation of 21 U.S.C. §§ 846 and 963. The Supreme Court found it unavailing to draw any inference concerning cumulative intent from the fact that both statutes were enacted pursuant to a single bill, the Comprehensive Drug Abuse Prevention and Control Act of 1970. [**14] Noting that "Congress is predominantly a lawyer's body" and hence is presumed to "know the law," the

Court concluded that "if anything is to be assumed from the congressional silence . . ., it is that Congress was aware of the Blockburger rule and legislated with it in mind." *Id.* at 341-42 (internal quotation marks and citations omitted).

VI.

The District Court sentenced Beras to 292 months' imprisonment based on a total offense level of 40. n2 The court adopted the recommendations contained in Beras' Pre-Sentencing Report (PSR), which suggested: a base offense level of 23 under U.S.S.G. § 2S1.1(a)(1) (2000) because Beras engaged in a conspiracy to launder money with the intent to promote narcotics trafficking, in violation of 18 U.S.C. § 1956(a)(3)(A); n3 a ten-level enhancement under U.S.S.G. § 2S1.1(b)(2)(K) (2000) because the total amount of laundered funds approximated $ 27 million; a four-level enhancement under U.S.S.G. § 3B1.1(a) (2000) because Beras was the "organizer or leader" of a laundering operation that "involved five or more participants;" and a three-level enhancement under U.S.S.G. § 2S1.1(b)(1) (2000) [**15] because Beras "knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution [*462] of narcotics." Due to the absence of any known prior criminal convictions, Beras' final sentencing range fell between 292 and 365 months' imprisonment.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Pursuant to U.S.S.G. § 3D1.2(d) (2000), all of the counts for which Beras was convicted were grouped together for purposes of a single sentence.

n3 Because all of Beras' crimes were grouped together pursuant to U.S.S.G. § 3D1.2(d), the base offense level used was that of the count which yielded the highest base offense level--the money laundering conspiracy count. U.S.S.G. § 3D1.3(b) (2000).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On appeal, Beras contends that the District Court exceeded its discretion when it concluded, based on its own

independent reading of the evidence, that the object of Beras' money laundering conspiracy was to promote narcotics trafficking, in violation of 18 U.S.C. § 1956(a)(3)(A). The Guidelines, [**16] however, permit the District Court to do exactly as it d*id.* Where a conspiracy count alleges multiple objects of the conspiracy, U.S.S.G. § 1B1.2(d) provides:

A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Application Note 4 of the Commentary accompanying U.S.S.G. § 1B1.2 further advises that:

Particular care must be taken in applying [U.S.S.G. § 1B1.2(d)] because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. (emphasis added).

The District Court therefore acted within its discretion when it applied a base offense level of 23 pursuant to U.S.S.G. § 2S1.1(a)(1) (2000).

Beras further challenges, as clear error, each of the District Court's sentencing enhancements. [**17] Under the Sentencing Guidelines, "disputed facts relevant to sentencing . . . need be established only by a preponderance of the evidence." *United States v. Concepcion*, 983 F.2d 369, 388 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993). In reaching its factual conclusions, the sentencing court "remains entitled to rely on any type of information known to it." *Id.* We have carefully reviewed the record and conclude that the District Court's 17-level enhancement was not clearly erroneous.

VII.

In the course of this appeal, Beras filed two "supplemental pro se briefs" charging his trial counsel with

ineffective assistance on various grounds. We have expressed "a baseline aversion to resolving ineffectiveness claims on direct appeal." *United States v. Williams*, 205 F.3d 23, 35 (2d Cir.), cert. denied, 531 U.S. 885, 148 L. Ed. 2d 142, 121 S. Ct. 203 (2000). This is because

> ineffective assistance claims are often based on assertions that trial counsel made errors of omission, errors that are difficult to perceive from the record: for example, neglecting to call certain witnesses or introduce certain [**18] evidence. The claims might also be based on a conflict of interest not apparent at trial. Proof is sometimes provided in attorney-client correspondence, or in other documents not introduced at trial.

Billy-Eko v. United States, 8 F.3d 111, 114 (2d Cir. 1993), superseded by statute on another ground as stated in *Triestman v. United States*, 124 F.3d 361, 369 n.8 (2nd Cir. 1997). As Beras' ineffective assistance of counsel claims "require[] consideration of evidence not contained in the record, we will not reach it here, and if [Beras] wishes to pursue the issue, he must raise it on a collateral attack of his convictions." *United States v. Joyner*, 313 F.3d 40, 2002 U.S. App. LEXIS 24662, No. 96-1198, slip op. at 8879 (2d Cir. Dec. 5, 2002). [*463]

VIII.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

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APPENDIX C

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
ENTERED 11-28-01

ENTERED NOVEMBER 28, 2001
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
UNITED STATES OF AMERICA,

v.

Roberto Beras
a/k/a: Roberto Silvestre

Case Number: 1:S 3 99 CR00075-02 (SWK)
Defendant's Attorney: David Zapp
THE DEFENDANT:
[] pleaded guilty to count(s)
[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[] was found guilty on count(s) 1 to 82 after a plea of not guilty.

Title & Section: 18 U.S.C. §1956(h)
Nature of Offense: Conspiracy to commit money laundering
Date Offense Concluded: 7/31/1996
Count Number(s): 1
Title & Section: 18 U.S.C. §371
Nature of Offense: Conspiracy to evade currency reporting requirements
Date Offense Concluded: 7/31/1996
Count Number(s): 2
Title & Section: 18 U.S.C. §1956(a)(2)(B) (i) & (ii) and 2
Nature of Offense: Money laundering
Date Offense Concluded: 7/31/1996
Count Number(s): 3-35
Title & Section: 18 U.S.C. §1956(a)(3)(A) (B) & (C) and 2
Nature of Offense: Money laundering
Date Offense Concluded: 7/31/1996
Count Number(s): 36-42

The defendant is sentenced as provided in pages 2 through 7 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
[] The defendant has been found not guilty on count(s)_____
[] Count(s)_____dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: 091-74-0942
Defendant's Date of Birth: 03/15/1961
Date of imposition of Judgement: November 21, 2001
Defendant's USM No.: 45865-054
Defendant's Residence Address: 16 Alice Place,Bergenfield, NJ 17621.
Defendant's Mailing Address: same as above.

Signature of Judicial Officer
/SS/_____.
Name and Title of Judicial Officer:
Hon. Shirley Wohl Kram
UNITED STATES DISTRICT JUDGE
Date 11-28-01
DEFENDANT: ROBERTO BERAS
CASE NUMBER: 1:S 3 99 CR00075-02 (SWK)

ADDITIONAL COUNTS OF CONVICTION

Title & Section: 31 U.S.C. §5324(a)(3) & 18 U.S.C. 2
Nature of Offense: Evading currency reporting requirements
Date Offense Concluded: 7/31/1996
Count Number(s): 43-75

Title & Section: 31 U.S.C. §5324(a)(1) & 18 U.S.C. 2
Nature of Offense: Evading currency reporting requirements
Date Offense Concluded: 7/31/1996
Count Number(s): 76-82

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 292 months(235 mos. On each of Count 1 and 3-42 to run concurrent; and 57 mos. On each Count 2 and 43-82 to run concurrent and to run consecutively w/Counts 1 and 3-42).

[] The Court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district
[ ] at __ a.m. to __ p.m. on _____
as notified by the United States Marshal.
[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] by2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATESMARSHAL

By

_____

. Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in

accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.
2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.
3. The defendant shall comply with the directives of the Immigration and Naturalization Service and the Immigration laws.
4. The defendant is to report to the nearest Probation Office within 72 hours of release from custody.
5. The defendant is to be supervised by the district of residence.
6. The defendant shall forfeit interest in his home located at 16 Alice Place Bergenfield, New Jersey, and his interest in any and all bank and securities accounts under his name.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

	Assessment	Fine	Restitution
Totals:	$4,100.00	$	$

[ ] if applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

[ ] The above fine includes costs of incarceration and/or supervision in the amount of $ $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612 (f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612 (g).

[ ] The Court determined that the defendant does not have the ability to pay interest and it is ordered that.

[ ] The interest requirement is waived

[ ] The interest requirement is modified as follows

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals: $_____			

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses

committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied ;n the following order: (1) assessment: (2) restitution: (3) fine principal: (4) cost of 3secution: (5) interest: (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

[x] in full immediately: or

[ ] $____ immediately, balance due (in accordance with C, D, or E); or

[ ] not later than _____; or

[ ] in installments to commence 30 day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

[ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____

over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[x] The defendant shall forfeit the defendant's interest in the following property to the United States:

16 Alice Place, Bergenfield, NJ 17621.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal

monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[x] The Court adopts the factual findings and guideline application in the presentence report.

OR

[]The Court adopts the factual findings and guideline application in the presentence report except:

Guideline Range Determined by the Court:
Total Offense Level: 40
Criminal History Category: 1
Imprisonment Range: 292 to 365 months.
Supervised Release Range: 2 to 3 years.
Fine Range: $25,000.00 to $41,227,000.00

[ ] Fine waived or below the guideline range because of inability to pay.
Total Amount of Restitution: _____
[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).
[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1DgA, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial or no restitution is ordered for the following reason(s):

[x] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

OR

[ ] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

APPENDIX D

ORDER OF THE COURT OF APPEALS
FOR THE SECOND CIRCUIT
DATED 10-9-03

FILED
OCT 9 - 2003
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT
HOUSE
40 FOLEY SQUARE
NEW YORK 10007
ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of October two thousand three.

USA,
Appellee,
v
Dinero Express, Inc.,
Appellant.

Dkt No: 01-1634

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Roberto Beras.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By: _____
Arthur M. Heller
Motions Staff Attorney

APPENDIX E

USDC ORDER DENYING MOTION TO DISMISS ENTERED 3-6-00

2000 U.S. Dist. LEXIS 2439, *

UNITED STATES OF AMERICA, -against- DINERO EXPRESS, INC., ROBERTO BERAS, MARIA Y. MENDOZA and LUIS FRANCISCO SORIANO, Defendants.

99 Cr. 975 (SWK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 2439

March 1, 2000, Decided

March 6, 2000, Filed

COUNSEL: For United States of America: Andrew J. Ceresney, Mary Jo White, United States Attorney, New York, New York.

For Roberto Beras: Charles Ross, Brafman & Ross, P.C., New York, New York.

For Maria Y. Mendoza: Robert C. Gottleib, Law Offices of Robert C. Gottleib, Commack, New York.

JUDGES: SHIRLEY WOHL KRAM, UNITED STATES DISTRICT JUDGE.

OPINIONBY: SHIRLEY WOHL KRAM

OPINION: MEMORANDUM OPINION AND ORDER

SHIRLEY WOHL KRAM, U.S.D.J.

Defendants Roberto Beras ("Beras") and Maria Y. Mendoza ("Mendoza") (collectively, "Defendants") move: (1) to dismiss the indictment in the above-captioned action on the ground that pre-indictment delay violated their constitutional rights to Due Process; and (2) to suppress physical evidence seized following a search of two buildings owned by Dinero Express Inc. ("Dinero"). For the reasons set forth below, Defendants' motions are denied.

BACKGROUND

I. The Investigation and Warrants

On July 31, 1996, United States Magistrate Judge Ronald L. Ellis issued a warrant authorizing a search of 591 W. 181st Street, [*2] New York, New York (the "181st

Street Builing"). On August 1, 1996, Magistrate Judge Ellis issued a second warrant authorizing a search of 1887 Webster Avenue, Bronx, New York (the "Webster Avenue Building"). Pursuant to the warrants, agents seized a number of documents and cash evidencing Dinero's involvement in the laundering of between $ 10 and $ 20 million from 1994-1996.

The search warrant issued for the 181st Building was based on a thirty-two-page affidavit submitted by United States Customs Service Special Agent Drew F. Houlihan ("Agent Houlihan"). Affidavit of Agent Houlihan, sworn to July 31, 1996 ("181st Street Aff."), attached to Affidavit of Charles A. Ross, Esq., sworn to May 9, 2000 ("Ross Aff.") as Exhibit "A". The search warrant issued for the Webster Avenue Building was based on a seven-page affidavit submitted by Agent Houlihan, which incorporated by reference the 181st Street Affidavit. Affidavit of Agent Houlihan, sworn to Aug. 1, 1996 ("Webster Avenue Aff."), attached to Ross Aff. as Exhibit "C."

The 181st Street Affidavit describes a two-year-long investigation of money laundering by Dinero, a money remitter, and several of its employees. 181st Street Aff., [*3] P 15. The 181st Street Affidavit describes in detail eight separate occasions where a Confidential Informant (the "CI") or an undercover officer working for the United States Customs Service would deliver cash represented as narcotics trafficking proceeds to Dinero for remittance to the Dominican Republic and Puerto Rico. Id., PP 13, 17(b)-(mm). The Dinero employees would inform the CI or the undercover officer that the funds would be available within a short period of time in Puerto Rico or the Dominican Republic. After the cash was remitted either to Puerto Rico or the Dominican Republic, undercover officers would collect it or have it transferred to an undercover bank account. Id. The eight transactions detailed in the 181st Street Affidavit involved in excess of $ 550,000. Id., P 15.

During one of the transactions, Rafael Liriano ("Liriano"), a Dinero employee, indicated that Dinero used a variety of different methods for laundering cash. 181st Street Aff., P 17(a). Liriano informed the CI that when he laundered money for a client, he would do it in such a way as to avoid detection. Id. For transactions under $ 200,000, he would structure n1 the transactions using [*4] a number of fictitious names and dollar amounts in order to conceal the CI's ownership of the money. Id. Liriano stated that he conducted similar transactions for other drug traffickers. Id., P 17(a).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 According to the 181st Street Affidavit, money remitters, such as Dinero, are required to file a Currency Transaction Report, IRS form 4789 ("CTR"), with the Internal Revenue Service ("IRS") for transactions involving currency in excess of $ 10,000. 181st Street Aff., P 4(b). The CTR informs the IRS of the identity of the individual for whom the transaction was conducted. Id., P 4(c). The 181st Street Affidavit describes "Structuring" as the breaking down of currency amounts in excess of $ 10,000 into amounts of $ 10,000 or less in an attempt to evade the filing of CTR's. Id., P 4(e). Allegedly, "Structuring" is commonly employed to launder proceeds of narcotics trafficking and move the money out of the United States. Id., P 4(f).

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

The 181st Street and Webster Avenue Affidavits requested permission [*5] to seize ten categories of evidence: (1) documents related to money transfers by Dinero; (2) documents related to Dinero and Dinero employee bank accounts; (3) documents related to CTR's filed by Dinero; (4) documents related to Dinero's business relationship agreements with its offices; (5) documents related to Dinero's accounting and financial information; (6) documents related to wire transfers made by Dinero; (7) documents related to ownership of Dinero; (8) telephone records; (9) cash in excess of $ 10,000; and (10) computer records of those documents. See 181st Street Aff. PP 24(a)-

(j); Webster Avenue Aff PP 4(a)-(j). Categories one through seven were limited to documents from the period of 1993 to the "present." 181st Street Aff. PP 24(a)-(g); Webster Avenue Aff PP 4(a)-(f)

Agent Houlihan described in the 181st Street Affidavit the need for the seizure of the above evidence. Agent Houlihan stated that, "based on [his] experience investigating the laundering and structuring of narcotics proceeds, individuals in money laundering and structuring maintain records of these transactions for long periods of time." Id., P 17. Likewise, Agent Houlihan described that documentation [*6] of legal and illegal remittances would need to be seized because (1) it would be near impossible to discern legal from illegal remittances, and (2) the legal remittances were used to disguise illegal remittances and therefore were evidence of the money laundering. Id., PP 20-21. Similarly, Agent Houlihan averred that ownership records would need to be seized because Liriano indicated that he was using profits from the laundering transactions to purchase an interest in Dinero. Id., P 23. With regard to the seizure of cash, Agent Houlihan stated that Beras told the CI that cash delivered to Dinero for remittal was kept at the 181st Street Building on at least one occasion. Id., P 22. Agent Houlihan noted that Dinero employed a computer system which he believed contained information about Dinero's remittances. Id., P 18.

The Webster Avenue Affidavit requested permission to search for and seize substantially the same evidence sought by the 181st Street Affidavit. n2 Webster Avenue Aff., PP 4(a)-(j). In the Webster Avenue Affidavit, Agent Houlihan incorporated by reference the 181st Street Affidavit. Id., P 2. Agent Houlihan described that while executing the search [*7] warrant for the 181st Street Building, he was informed by Soriano that Dinero stored its records for 1994 and the years prior at the 1887 Webster Avenue Building. Id.

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n2 The Webster Avenue Affidavit did not seek evidence from categories seven and eight, ownership and telephone records, respectively.

----------End Footnotes----------II.

Indictments

On February 1, 1999, a grand jury sitting in the Southern District of New York returned an indictment charging Dinero with numerous counts of money laundering and structuring financial transactions. On March 30, 1999, a superseding indictment was returned, adding Beras and Luis Francisco Soriano ("Soriano") as defendants. Finally, on April 29, 1999, a second superseding indictment ("Second Superseding Indictment") was returned, adding Mendoza as a defendant.

The Second Superseding Indictment contains 82 counts. Count One charges Dinero, Beras and Soriano with conspiracy to launder money, in violation of 18 U.S.C. § 1956(h). Count Two charges Dinero, Beras, Mendoza [*8] and Soriano with conspiracy to structure transactions to avoid currency reporting requirements, in violation of 31 U.S.C. § 5324. Counts Three through Thirty-Five charge Dinero and Beras with specific laundering transactions ranging in amounts from $ 51,000 to $ 714,000, in violation of 18 U.S.C. § 1956(a)(2)(B)(ii). Counts Thirty-Six through Forty-two charge Dinero, Beras, and in one count, Soriano, with laundering the money delivered by a confidential informant (the "CI") during the undercover phase of the Governemnt's investigation of Dinero, in violation of 18 U.S.C. § 1956(a)(3). Counts Forty-Three through Seventy-Five charge Dinero, Beras and Mendoza with structuring particular financial transactions, in violation of 31 U.S.C. § 5324. Counts Seventy-Six through Eighty-Two charge Dinero, Beras, and in one count, Soriano, with failing to file Currency Transaction Reports for the funds delivered by the CI.

Defendants now contend that the Second Superseding Indictment must be dismissed because the five year delay between the alleged offense conduct and their indictments

has prejudiced [*9] them to such an extent as to violate their rights to Due Process. They also contend that all evidence seized from the 181st Street and Webster Avenue Buildings must be suppressed as the search warrants for both locations were issued without probable cause. Additionally, Defendants contend that the evidence must be suppressed because the searches were conducted pursuant to unconstitutional general warrants. The Government contends that the timing of Defendants' indictments does not offend their rights to Due Process and that the searches of the 181st Street and Webster Avenue Builings were conducted pursuant to validly issued search warrants, which were properly executed by agents acting in objectively reasonable reliance upon the warrants.

DISCUSSION

I. Dismissal of the Indictment

Defendants contend that the five-year delay between the alleged offense conduct and their indictment violates their rights to Due Process. The Second Circuit has held that criminal prosecutions commenced within the requisite statute of limitations period carry a strong presumption of validity and will only rarely be dismissed. *United States v. Cornielle*, 171 F.3d 748, 751-752 (2d Cir. 1999). [*10] It is undisputed in the present case that Defendants were indicted within the statute of limitations for the crimes with which they are charged. Accordingly, the Second Superseding Indictment enjoys a strong presumption of validity. See id. at 752. Therefore, to succeed in having the indictment dismissed, Defendants bear the heavy burden of establishing (1) that the delay caused them actual and substantial prejudice, and (2) that the delay was for tactical advantage or an otherwise improper or illegitimate prosecutorial purpose. See id. Each prong of this standard will be addressed in turn below.

A. Actual Prejudice

First, counsel for Beras' states, without further elaboration, that the five year pre-indictment delay "undoubtedly [has] caused actual memories of the

transactions to fade." Affidavit of Charles Ross, Esq., sworn to Nov. 30, 1999, ("Ross Aff.") P 11, attached to Beras' Notice of Motion, dated Nov. 30, 1999. Defendants have not specified which, if any, witnesses' memories have faded or how such faded memories have caused them actual prejudice. This speculative allegation, without more, is insufficient to carry Defendants' burden of establishing [*11] actual prejudice. See *United States v. Marion*, 404 U.S. 307, 322 92 S. Ct. 455, 30 L. Ed. 2d 468 (1977) (possibility that will memories dim insufficient to show actual prejudice).

Next, defense counsel for Beras asserts that "upon information and belief, at least one potential witness, Rafael Liriano, has become unavailable during this time." Ross. Aff. P 12. However, Defendants do not indicate how this witness was made unavailable by the pre-indictment delay. Moreover, Defendants do not explain how this witness' testimony would have been beneficial to their case or whether the witness would have cooperated with defense counsel at all. Indeed, Defendants do not challenge the Government's assertion that Liriano's testimony actually would have been damaging to the Defendants and beneficial to the Government. Gov't's Memorandum of Law ("Gov't's Memo.") at 9. Therefore, the Court finds that Defendants have not established actual prejudice.

B. Intentional Delay To Gain a Tactical Advantage

In their Memorandum of Law, Defendants contend that the pre-indictment delay "clearly has been motivated by the government's interest in securing the cooperation of defendants [*12] in the initially indicted case, in order to gain an advantage in the prosecution of [Defendants]." Defs.' Memorandum of Law ("Defs.' Memo.") at 3. However, Defendants do not offer support for this argument. Defense counsel for Beras also contends in his affidavit that the gap in time between the offense conduct and indictment "cannot be explained except as a strategy to gain a tactical advantage in [Defendants'] prosecution." Ross Aff., P 11. In response, the Government offers the affidavit of Agent Houlihan, in which

he states that the Government spent much of the time between the search and arrest of the Defendants investigating the case and analyzing documents seized in the search and obtained from cooperating witnesses. See Affidavit of Agent Houlihan, sworn to Dec. 23, 1999, attached to Gov't's Memo. as Exh. "A." Upon consideration of Defendants' speculation as to the cause of the pre-indictment delay, and Agent Houlihan's affidavit, the Court finds that Defendants have not satisfied their burden of establishing that the Government intentionally delayed indictment to gain a tactical advantage or for some other improper purpose. Defendants have not satisfied either of the [*13] two requirements necessary for dismissal, and therefore, their motion to dismiss the Second Superseding Indictment is denied.

II. Motion To Suppress

A. Standing

In order to challenge a search or seizure on Fourth Amendment grounds, a defendant must establish a reasonable expectation of privacy with respect to the area searched. See, e.g. *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J. concurring). The Second Circuit has further explicated this rule in *United States v. Chuang,* 897 F.2d 646 (2d Cir. 1990), which directs a court considering standing to focus on two distinct elements. First, in order to claim standing to challenge a search or seizure, a party must have had a subjective expectation of privacy in the searched place or evidence seized. Id. at 649. Second, that party's expectation must be one that society accepts as reasonable. Id. The defendant bears the burden of establishing that he had a reasonable expectation of privacy in the place searched. *United States v. Hamdan,* 891 F. Supp. 88, 94-95 (E.D.N.Y. 1995), *aff'd,* 101 F.3d 686 (2d Cir. 1996). [*14]

Whether a corporate officer has standing to challenge the search of a business premises depends upon whether the officer has made a "sufficient showing of a possessory or proprietary interest in the area searched," and whether the

officer has demonstrated a sufficient nexus between the area searched and his own work place. Id. In *United States v. Hamdan*, 891 F. Supp. 88 (E.D.N.Y. 1995), aff'd, 101 F.3d 686 (2d Cir. 1996), the court noted:

> Generally, courts tend to find that these two elements are sufficiently established when the area searched is set aside for the defendant's exclusive use, such as an individual's office. However, courts are more skeptical of standing claims when the defendant only occasionally used the area searched. The greater the degree of exclusivity and control over a work area, and the more time a defendant spends there, the more likely standing is to be found . . . . By contrast, the less private - and the less control a defendant has over that work area - the less likely standing is to be found. 891 F. Supp. at 94-95.

Mendoza has offered nothing to establish that she had a reasonable expectation [*15] of privacy in the premises searched or evidence seized. Therefore, the Court finds that she has no standing to challenge the search and resulting seizure of evidence. Accordingly, Mendoza's motion to suppress is denied.

Beras has submitted an affidavit in which he states that he was vice president of Dinero at the time the searches were conducted, see Affidavit of Roberto Beras, sworn to Jan. 13, 2000 ("Beras Aff."), P 5, attached to Beras' Reply Memo. of Law ("Reply Memo."), that the 181st Street and Webster Avenue Buildings contained areas which were not open to the public, id. PP 6, 8-10, and that he occupied an office at the 181 Street Building from which he could exclude others, id. P 7. Beras also states that on occasion he visited the Webster Avenue Building. Id. P 10. From this, Beras concludes: "I had a legitimate expectation of privacy in my own office at W. 181 Street, and in the adjoining office space and first floor glass-protected area. I also had a legitimate expectation of privacy in the Dinero Express office space at the Webster Avenue Building." Id. P 11.

Beras' allegation that he could exclude others from an office at the 181st Street Building, [*16] without more, is insufficient to sustain his burden to establish standing. n3 Beras has not alleged any nexus between his work space and the area searched. See *United States v. Chuang*, 897 F.2d at 649. Similarly, Beras has not provided the Court with evidence from which it could conclude that he had a reasonable expectation of privacy at the Webster Avenue Building, instead stating that he visited there occasionally. Accordingly, the Court finds that Beras lacks standing to challenge the searches of the 181st Street and Webster Avenue Buildings and his motion to suppress is denied. n4

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n3 The Court informed Defendants and the Government that it intended to hold a hearing to determine whether Beras or Mendoza has standing to challenge the searches. Defendants informed the Court that they would present no evidence at the hearing to establish standing. See Letter from Charles A. Ross, to Judge Shirley Wohl Kram, dated February 14, 2000.

n4 Even assuming that Defendants had standing to challenge the searches, the motion to suppress would be denied because as will be discussed in detail below, the search warrants were issued on probable cause.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*17]

B. The Warrants

1. Probable Cause

"A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *United States v. Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). A reviewing court should not interpret supporting affidavits in "'a hypertechnical, rather than a commonsense manner . . . . The resolution of doubtful cases . . . should be largely determined by the preference to be accorded to warrants.'" *United States v. Smith*, 9 F.3d at 1012

(quoting *United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)). Indeed, "the quanta . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar v. United States*, 338 U.S. 160, 173, 69 S. Ct. 1302, 1309, 93 L. Ed. 1879 (1949). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision." *United States v. Smith*, 9 F.3d at 1012. [*18] In the end,

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed. *Id.* at 1012-1013 (internal quotations omitted).

Defendants do not dispute that the affidavit of Special Agent Houlihan demonstrated that Dinero was involved in a money laundering scheme that existed over a two year period, involving the laundering of over $ 550,000 through approximately eight transactions. Instead, the gist of Defendants' argument is that the 181st Street Affidavit contained information that Dinero and Defendants went to great lengths to avoid creating any documentation of laundering transactions, and except for isolated occasions, no receipts were given to the CI evidencing the remittances. Thus, Defendants argue, given this [*19] information, Magistrate Judge Ellis could not have concluded that there was probable cause to believe that documentary evidence of Dinero's laundering activities would be found at the 181st Street or Webster Avenue Buildings. Def.'s Memo. at 4-7.

United States Magistrate Judge Ronald L. Ellis was presented with the thirty-two page 181st Street Affidavit

which alleged that over a two year period the Government had conducted an undercover investigation involving the laundering of over $ 550,000 in approximately eight transactions. Loriano indicated that for transactions under $ 200,000, Dinero employees would "break-down" the money into amounts of less than $ 10,000, and then create fictitious remittances for those amounts. Here, each of the eight transactions involved less than $ 200,000. Therefore, it is logical to conclude that fictitious remittances were created as a result of at least some of the eight transactions. Moreover, the CI was informed that Dinero executed similar money laundering transactions for other narcotics traffickers and that on at least one occasion money from a laundering transaction was stored at the 181st Street Building. This information alone is sufficient [*20] to establish probable cause to believe that evidence of the money laundering crimes would be found at the 181st Street Building.

In addition, Agent Houlihan detailed in the 181st Street Affidavit that based on his training and experience, which included numerous investigations involving money laundering, some involving money remitters, he believed that "individuals involved in money laundering and structuring maintain records of these transactions for long periods of time," and "must maintain their records in the event that a money laundering transaction is questioned by the sender or the drug trafficker," and that this is especially true when large amounts of money are involved, as was the case here. Agent Houlihan also concluded that, in his experience, money launderers often store money in safes. Magistrate Judge Ellis properly considered the facts established through Agent Houlihan's training and experience when determining whether probable cause existed to issue the warrants. See *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985) ("agent's expert opinion is an important factor to be considered by the judge reviewing a warrant application"). Accordingly, [*21] the Court finds that the facts presented to Magistrate Judge Ellis by the 181st Street Affidavit

provided a substantial basis from which to conclude that probable cause existed to search the 181st Street Building for evidence of money laundering.

Likewise, there was probable cause to search the Webster Avenue Building. The Webster Avenue Affidavit sought the same general evidence that was requested by the 181st Street Affidavit. Agent Houlihan incorporated by reference the 181st Street Affidavit into the Webster Avenue Affidavit. Moreover, Agent Houlihan stated in the Webster Avenue Affidavit that while executing the search warrant for the 181st Street Building, Agent Houlihan was informed by Soriano that Dinero's records from 1994 and prior were stored at the Webster Avenue Building. Defendants argue that the Webster Avenue Building search warrant was not based on probable cause because the 181st Street Affidavit contained information that Dinero went to great lengths to avoid detection or generate documentary evidence. The Court finds this argument without merit. Accordingly, the Court finds that Magistrate Judge Ellis properly determined that probable cause existed to search the [*22] Webster Avenue Building as well.

2. Particularity

Defendants contend that the warrants were not particular in their description of evidence to be seized and therefore the evidence seized must be suppressed. A search warrant is sufficiently particular when it enables a searcher to ascertain and identify with reasonable certainty the items to be seized. *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992). The particularity requirement of the Fourth Amendment does not require that every item or document to be seized be specifically identified within the warrant. *National City Trading Corp. v. United States*, 635 F.2d 1020, 1026-27. Indeed, generic terms can properly be used to describe the material to be seized. See, e.g., *United States v. Burke*, 453 F.2d 563 (2d Cir. 1971), cert. denied, 406 U.S. 925, 32 L. Ed. 2d 126, 92 S. Ct. 1795 (1972). Moreover, the validity of a warrant is not affected by the fact that a vast

amount of material falls within its scope. *United States v. Heldt*, 215 U.S. App. D.C. 206, 668 F.2d 1238, 1254 (D.C. Cir.), cert. denied, 456 U.S. 926 (1982). "The standard for constitutional [*23] particularity thus requires that a warrant be 'sufficiently specific to permit the rational exercise of judgment [by the executing officers] in selecting what items to seize.'" *United States v. Regan*, 706 F. Supp. 1102, 1110 (S.D.N.Y. 1989).

The warrants in this case did not permit a general search of Dinero's premises. The affidavits attached to the warrants contain ten categories of physical evidence to be seized: (1) documents related to money transfers by Dinero; (2) documents related to Dinero and Dinero employee bank accounts; (3) documents related to CTR's filed by Dinero; (4) documents related to Dinero's business relationship agreements with its offices; (5) documents related to Dinero's accounting and financial information; (6) documents related to wire transfers made by Dinero; (7) documents related to ownership of Dinero; (8) telephone records; (9) cash in excess of $ 10,000; and (10) computer records of those documents. Categories (1)-(8) are limited to documents relevant to the period of 1993 to the present. Although the warrants authorized the seizure of a large number of documents, it contained a clear and easily understood listing of the types of [*24] documents to be seized as evidence of criminal activity by Defendants. The Court is confident that an "agent can rationally understand and implement these terms." *United States v. Regan*, 706 F. Supp. at 1110. In fact, each category of description listed examples of the types of documents to be seized, such as books, records, receipts, and notes, which further aided the agents in identifying what evidence was to be seized. See *United States v. Riley*, 906 F.2d 841, 845 (2d Cir. 1990) (description held sufficiently particular because it supplied examples of the type of records sought). In the end, the warrants' terms "left the federal agents, at best, with no discretion about what should be seized and, at worst, with the reasonable guidance necessary

for the exercise of rational judgment that constitutes the practical standard of particularity." *United States v. Regan*, 706 F. Supp. at 1111. Accordingly, the Court finds that the warrants do not violate the particularity requirement.

3. Overbreadth

Defendants also argue that the warrant was overbroad because it allowed for the seizure of evidence which would not constitute evidence [*25] of illegal activities. "When a warrant is challenged as overbroad, the issue is whether there exists probable cause to support the breadth of the search that was authorized." *United States v. Wapnick*, No. 92 Cr. 419, 1993 WL 86480, at *5 (E.D.N.Y. March 16, 1993), aff'd, 60 F.3d 948 (2d Cir. 1995), *cert. denied*, 517 U.S. 1187, 134 L. Ed. 2d 776, 116 S. Ct. 1672 (1996). As described in detail above, a "commonsense, practical" review of the "totality of the circumstances" is necessary to determine whether "in a particular factual context the probability of criminal conduct has been established." *Illinois v. Gates*, 462 U.S. at 230.

Here, Special Agent Houlihan's affidavit explained in great detail why all records of remittance transactions, both legal and illegal, required seizure. Special Agent Houlihan explained that without lengthy analysis of Dinero's remittances and records seizing agents would not be able to discern legitimate remittances from disguised and structured remittances. See, e.g., *United States v. Wapnick*, 1993 WL 86480, at *5-6 (rejecting defendant's argument that warrant permitted [*26] seizure of items with no evidentiary value by noting that "in order to reconstruct defendants' true financial and tax picture, evidence regarding legal as well as illegal transactions may be necessary" and "a warrant cannot be so narrow that it requires executing agents to conduct a lengthy, on-site examination of the documents in order to separate evidence of illegal transactions from evidence of legal transactions"). Agent Houlihan also explained his belief that the lawful remittances were evidence of money laundering:

Furthermore, I believe that the only way that Dinero Express can structure and launder narcotics proceeds without detection is by surrounding them with lawful remittances. In other words, by including non-structured remittances with structured remittances, Dinero Express is able to better conceal the structured transactions. Since the lawful remittances lend a cover of legitimacy to the tainted remittances, they are also evidence of the criminal money laundering and currency reporting violations at Dinero Express.

This is sufficient to establish probable cause to search for and seize remittances from both lawful and unlawful transactions.

There was [*27] also probable cause to seize the evidence listed in the remaining categories. Seizure of Dinero bank account and accounting records would be necessary to trace the path of laundered funds. Employee's bank accounts may evidence payments received for their participation in the money laundering scheme, payments which at least one employee had indicated he was using to purchase an interest in Dinero. Records relating to CTR's are relevant to whether Dinero was complying with the CTR requirements. Lastly, telephone records would aid in identification of other persons or organizations using Dinero to launder money, as would appointment books and correspondence.

Additionally, it is appropriate to seize all records of a business where the criminal activity permeates much of the business, or where all of the records of the business constitute evidence of a crime. See *United States v. C.E.C. Services*, 869 F.2d 184, 187 (2d Cir. 1989) ("When the criminal activity pervades the entire business, seizure of all records of the business is appropriate, and broad language used in warrants will not offend the particularity requirements."). The 181st Street Affidavit, which outlines [*28] a series of money laundering activities over a two-year period and contains an employee's representation that Dinero laundered money for other narcotics traffickers, can be fairly read as

setting forth probable cause to believe that the entire business conducted from the Dinero premises was "permeated with fraud." Therefore, seizure of all records from the premises was justified.

4. Good Faith

Even assuming the search warrants were not supported by probable cause, did not satisfy the particularity requirement or were overbroad, the evidence seized here would be admissible under the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984) ("Leon"). Leon confines the inquiry into whether officers acted in good faith in executing the warrants "to the objectively ascertainable question whether a reasonable well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23.

In light of the facts that the 181st Street Affidavit covered thirty-two pages, detailed an investigation lasting approximately [*29] two years, and discussed eight separate transactions of money laundering, it was objectively reasonable for the agents executing the search warrants to rely on Magistrate Judge Ellis's determination that probable cause existed to search for, and seize, the items listed in the 181st Street and Webster Avenue Affidavits. With regard to the particularity, the agents were objectively reasonable in relying on the categorization in the affidavits of the evidence to be seized, which was approved by Magistrate Judge Ellis. Accordingly, Defendants' motion to suppress is denied.

CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss the Second Superseding Indictment and suppress physical evidence are denied in their entirety.

SO ORDERED.

SHIRLEY WOHL KRAM

UNITED STATES DISTRICT JUDGE

Dated: New York, New York

March 1, 2000

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